

SUPREME COURT OF KENTUCKY

DISCRETIONARY REVIEW GRANTED
(Pending Cases Only)

DISCRETIONARY REVIEW GRANTED 3/9/16

Wright v. LP Pikeville, LLC, 2014-SC-238-DG
Guardianship. Contract. Arbitration Agreements. KRS 387.660. Issues include whether a legal guardian has the authority to enter into a binding pre-litigation arbitration agreement on behalf of her ward.

DISCRETIONARY REVIEW GRANTED 3/15/17

Scalise v. Sewell-Scheuermann, 2016-SC-246-DG
Taxes. Mayor and City Council. KRS 92.340. Issues include whether the city's mayor and council members are personally liable for spending excess funds raised under the city's sanitation tax on other legitimate city expenses.

Oral argument-December 2017

DISCRETIONARY REVIEW GRANTED 2/9/17 and CROSS MOTION GRANTED 4/19/17

Dept. of Medicaid Services v. Sexton, 2016-SC-529-DG, Coventry Health and Life Insurance Company v. Sexton, 2016-SC-0534-DG, and Sexton v. Cabinet for Health and Family Services, 2016-SC-540-DG **and** (Cross Motion) Coventry Health and Life Insurance Company v. Sexton, 2017-SC-95-DG
Medicaid. Denial of benefits. Appeals. Standing. On this cross-motion, a managed care organization which contracted with the Cabinet for Health and Family Services to provide services to a Medicaid recipient asks for a

determination of whether the recipient has standing to invoke the Cabinet's fair hearing procedures and the subsequent judicial review after receiving all of the medical treatment, and even though the recipient is not financially liable for unpaid expenses.

Oral argument-March 2018

DISCRETIONARY REVIEW GRANTED 4/19/17

Government Employees Insurance Company v. Houchens,
2016-SC-546-DG

Insurance. MVRA. KRS 304.39-270-(1). The question is whether a Kentucky motor vehicle reparations obligor may terminate their insured's basic reparations benefits premised purely upon "paper reviews" of medical records not tendered for court review.

Oral argument-October 2017

DISCRETIONARY REVIEW GRANTED WITHOUT ORAL ARGUMENT 6/8/17

Dorsey v. Commonwealth, 2017-SC-5-DG

Criminal Law. RCr 11.42. Denial of Counsel. Conflict of Interest. The issue is whether the Movant was denied his right to counsel during the motion to withdraw his guilty plea when his trial counsel was questioned under oath by the court as to what counsel advised his client regarding the minimum sentence (85%) he would have to serve prior to consideration for parole. It was asserted that this created a conflict of interest between counsel and his client, and thus denied him effective counsel at this critical stage of the proceedings.

DISCRETIONARY REVIEW GRANTED 8/16/17

Department of Revenue v. Sommer, 2017-SC-71-DG

Open Records. Issues involve the interplay between provisions of the KRS 131 Taxpayer Bill of Rights and Open Records Act exclusion KRS 61.878(1)(l) regarding Department of Revenue rulings not appealed to the Kentucky Board of Tax Appeals.

Oral argument-March 2018

DISCRETIONARY REVIEW GRANTED 9/20/17

Azmat v. Bauer, 2016-SC-560-DG

Infants. Personal Injury. *Pro Se* Practice. Issues include whether an injured child's non-attorney parent may appear *pro se* on the child's behalf.

Oral argument-August 2018

Travelers Indemnity Company v. Armstrong, 2017-SC-41-DG

Martin Cadillac, Inc. v. Armstrong, 2017-SC-42-DG

KRS 186.010(7)(c) and KRS 186A.220. Requirements to Transfer an Automobile. The issue is whether a car dealer complied with the statutory transfer requirements, specifically, obtaining proof of insurance prior to actual transfer of the vehicle, so as not to be deemed the owner of a vehicle at the time of a subsequent accident. Additional issues include (1) whether there can be a *bona fide* sale where the dealer has not yet received a valid title to transfer the vehicle; (2) whether under the circumstances the dealer complied with the statutory requirement that transfer paperwork be promptly completed, so as to be protected from liability for a subsequent accident, and (3) whether compliance by a subsequent dealer with the statutory requirement regarding proof of insurance absolves from liability for a subsequent accident a prior dealer who failed to promptly comply with the statute.

Oral argument-August 2018

DISCRETIONARY REVIEW GRANTED 10/25/17

Bradley v. Kentucky Retirement Systems, 2017-SC-275-DG

Administrative Law. State Disability Retirement. Issues involve viability and application of the "compelling evidence" standard for judicial review of denials of applications for state permanent disability retirement benefits.

Oral argument-June 2018

Northern Kentucky Area Development District v. Snyder, 2017-SC-277-DG

Employment Relations. Contracts. Arbitration. Federal Preemption. Issues involve enforceability of an arbitration agreement entered as a condition of employment with a public agency.

Oral argument-June 2018

Lexington-Fayette Urban County Human Rights Commission v. Hands-On Originals, 2017-SC-278-DG

Administrative Law. Human Rights Commission. Fairness Ordinance. Issues involve the alleged violation of a local fairness ordinance flowing from refusal of a private business to print customized T-shirts for the “Lexington Pride Festival.”

DISCRETIONARY REVIEW GRANTED 10/25/17 and CROSS MOTION GRANTED 12/7/17

Jones v. Bailey, 2017-SC-203-DG **and** (Cross Motion) Bailey v. Jones, 2017-SC-604-DG

Parole Board. Entitlement to Assistance of Counsel. The issues include whether the final post-incarceration sex offender supervision revocation hearing is a “critical stage” of the proceeding, triggering entitlement to assistance of counsel.

Oral argument-October 2018

DISCRETIONARY REVIEW GRANTED WITHOUT ORAL ARGUMENT 12/7/17

Bingham Greenebaum Doll v. Lawrence, 2017-SC-105-DG

Jurisdiction. Ripeness. Justiciability. Issues include whether the circuit court had jurisdiction over a law firm’s counterclaim for fees due under a promissory note when the counterclaim was filed two months before the note’s maturity date.

Kentucky Department of Corrections v. Dixon, 2017-SC-127-DG

Criminal Law. Corrections. Violent Offenders. Work-Time Credit. Issues involve whether Corrections was required to award work-time credits to an inmate serving consecutive sentences for several crimes, only one of which was a violent offense.

DISCRETIONARY REVIEW GRANTED 2/7/18

Commonwealth v. Riker, 2017-SC-483-DG

Criminal Law. DUI. Independent Blood Testing. Issues involve whether an individual arrested for DUI is deprived of due process by an independent blood testing facility requirement of prepayment of a \$450 fee for such testing after submission to intoxilyzer testing.

Oral argument-September 2018

Sparkman, d/b/a In-Depth Sanitary Service Group v. Consol Energy, Inc., 2017-SC-541-DG

Tortious Interference with Contract by a Parent Corporation of a Wholly-Owned Subsidiary. The issue of first impression in this case is whether claims for a tortious interference with a contract are barred under any circumstances against a parent corporation which prematurely terminates contracts entered into by its wholly-owned subsidiary, or whether and under what circumstances, such claims may be permitted against the parent corporation, and if so, whether the evidence in this case warranted submission of that claim to the jury for consideration.

Oral argument-February 2019

Cabinet for Health and Family Services, Commonwealth of Kentucky, on Behalf of the Minor Children, E. S. and K. S. v. R. S., 2017-SC-587

Sex Offender. Unsupervised Custody and Visitation with Minor Children. Dependency, Neglect and Abuse. The issue is whether a convicted sex offender may ever have custody of his own children without supervision. Also, may the court impose requirements of supervision without current allegations of abuse against the parent with a history of sexual abuse against a minor family member?

Oral argument-September 2018

DISCRETIONARY REVIEW GRANTED WITHOUT ORAL ARGUMENT **2/7/18**

Oliphant v. Ries, 2017-SC-208-DG

Medical Malpractice. Expert Witness Disclosures. Issues include: (1) whether the circuit court abused its discretion by allowing the defendant's expert witness to testify on an issue that was not mentioned in the expert witness disclosure but was discussed during the witness's deposition; and (2) whether the circuit court abused its discretion by refusing to allow the plaintiff to rebut the defense expert's theory with the testimony of an expert named shortly before trial.

Lawrence v. Bingham Greenebaum Doll, 2017-SC-531-DG

Legal Malpractice. Criminal Defense. Exoneration Rule. Issues include whether a convicted criminal must prove that he was judicially exonerated to succeed in his legal malpractice case against former defense counsel.

DISCRETIONARY REVIEW GRANTED 3/14/2018

Louisville MSD v. T+C Contracting, 2017-SC-274-DG
Contract. Fairness in Construction Act. KRS 371.405. Issues include whether the dispute resolution provisions in the parties' contract, which deem the contractor's claim for additional compensation from MSD waived if certain procedural requirements are not met, violate the Fairness in Construction Act.

Oral argument-October 2018

DISCRETIONARY REVIEW GRANTED 4/18/18

Bryant v. Louisville Metro Housing Authority, 2017-SC-367-DG
Governmental Immunity. Torts. Negligence. Issues include whether Louisville Metro Housing Authority is entitled to governmental immunity from the plaintiff's claims related to her child's shooting death at a housing authority apartment.

Oral argument-February 2019

McAlpin v. Commonwealth, 2018-SC-87-DG
Criminal Law. Constructive Possession of a Controlled Substance. Unanimity of a Verdict. The issue is whether language of a jury instruction violated the unanimity requirement, when the evidence gathered in the search of an apartment was allegedly only constructively possessed by the defendant.

Oral argument-February 2019

DISCRETIONARY REVIEW GRANTED WITHOUT ORAL ARGUMENT 2/7/18 and CROSS MOTION GRANTED WITHOUT ORAL ARGUMENT 4/18/18

Commonwealth v. James, 2017-SC-576-DG **and** (Cross-Motion) James v. Commonwealth, 2018-SC-66-DG
Criminal Law. Constructive Possession. Directed Verdict. Tampering with Evidence. The issue in this case is whether the defendant was entitled to a directed verdict of acquittal on possession of a controlled substance when it could not be established that he had possessed or dropped a pipe containing meth residue which was found near another item which was

dropped by the defendant, but which contained no drug residue. On cross-motion, the issue is whether the simple act of dropping evidence in plain view of the police was sufficient to satisfy the elements of the crime of tampering with evidence under KRS 524.100.

DISCRETIONARY REVIEW GRANTED 6/6/18

Greissman v. Rawlings and Associates, 2017-SC-518-DG

Torts. Wrongful Termination. Public Policy Exception. Lawyers. Issues include whether a lawyer who is terminated for refusing to violate the Supreme Court Rules of Professional Conduct has a viable claim for wrongful termination under the public policy exception to at-will employment.

Adams v. Commonwealth, 2017-SC-599-DG

Criminal Law. Expungement. KRS 431.073. Issues include whether a defendant's Class D felony convictions qualify for expungement as a "single incident" under KRS 431.073 when: (1) the defendant was convicted on four counts of theft by unlawful taking; (2) all four theft counts were charged in a single indictment; (3) the thefts occurred over a six-month period; and (4) all four thefts involved the same victim and the same type of property.

Getty v. Getty, 2018-SC-111-DG

Testamentary Capacity. Undue Influence. Directed Verdict. Misappropriation of Marital Property. Contempt. The main issues are whether there was sufficient evidence of lack of testamentary capacity and undue influence to overcome a motion for directed verdict. Another issue is whether the surviving spouse may be liable for misappropriation of marital property before and/or after the death of her husband. Also, was there a basis for holding the surviving spouse and her counsel in contempt of court for proceeding with cremation of the body of the deceased?

Krieger v. Garvin, 2018-SC-154-DGE

Child Custody. *De Facto* Custodians. At issue is the propriety of awarding "de facto" custodian status to an unmarried couple.

DISCRETIONARY REVIEW GRANTED 3/14/18 and CROSS MOTION GRANTED 6/6/18

Commonwealth v. Ferguson, 2017-SC-651-DG and Ferguson v. Commonwealth, 2018-SC-151-DG

Criminal Law. RCr 11.42 Motion. Ineffective Assistance of Counsel. *Pro Se* Defendant. The issue is whether the Defendant was entitled to a new trial when he and his trial counsel disagreed as to how to present his defense (suicide of the victim) to the charge of murder, resulting in the Movant seeking to represent himself at the close of the Commonwealth's case-in-chief. An additional issue is whether the failure of trial counsel to conduct a reasonable investigation of the suicide defense and to retain an expert to support it denied the Movant his right to effective assistance of counsel.

DISCRETIONARY REVIEW GRANTED WITHOUT ORAL ARGUMENT
6/6/18

Commonwealth v. Roth, 2018-SC-95-DG

Criminal Law. KRS 525.130. Cruelty to Animals. Wanton Conduct. Directed Verdict. The issue here is whether the Court of Appeals erred while granting discretionary review to reverse a jury verdict and conviction, ordering the entry of a directed verdict, on the grounds that there was insufficient evidence of the necessary *mens rea* required for conviction under this statute.

Baughman v. Commonwealth of Kentucky, Energy and Environment Cabinet, 2018-SC-104-DG

Administrative Law. Appointment of Receiver. Payment of Costs of Receiver. CR 54.04. The issue here is whether the trial court, within its discretion, may award the costs sought by a receiver appointed by the court against a prevailing party, which is a state agency carrying out its enforcement duties, which is then, in turn, given a judgment against the losing party in the amount of said costs.

DISCRETIONARY REVIEW GRANTED 8/8/18

Mostert v. The Mostert Group, 2017-SC-600-DG

Secured Transactions. Breach of Contract. Software and Source Code. Issues include whether the creator of a thoroughbred biometrics computer program was entitled to retain the program's "source code" when: (1) the

creator sold the program to a company in exchange for \$500,000 and a security interest in specified program components; (2) as part of the sale, the creator signed an agreement requiring him to transfer the program's software and source code to the company; and (3) the security agreement between the creator and the company listed software, but not source code, as collateral.

Metzger v. Auto-Owners Insurance Company, 2018-SC-70-DG
Insurance. Commercial Automobile. UIM. "Covered Autos". Issues involve whether an automobile insurance policy issued to an LLC as sole named insured of listed covered vehicles owned by the LLC provides first class or only second-class coverage to an LLC member injured as a pedestrian.

Meinders v. Middleton, 2018-SC-251-DG
KRE 403.270(1). *De Facto* Custodian. Tolling of time period for determination of *de facto* custodian status by filing of petition for custody by biological parent. The issue to be determined is whether the alleged *de facto* custodian had satisfied the requirements of the statute prior to the filing of a custody petition by the biological father.

DISCRETIONARY REVIEW GRANTED WITHOUT ORAL ARGUMENT
8/8/18

Culver v. Commonwealth, 2017-SC-568-DG
Criminal Law. First-Degree Wanton Endangerment. First-Degree Fleeing or Evading. Issues include whether a defendant who speeds during a nighttime police chase, but does not otherwise drive erratically, creates a substantial risk of death or serious physical injury sufficient for first-degree wanton endangerment and fleeing or evading.

DISCRETIONARY REVIEW GRANTED 9/19/2018

Isaacs v. Sentinel Insurance Company Limited d/b/a The Hartford, 2018-SC-78-DG
Insurance. Commercial Automobile. UIM. "Covered Autos." Issues involve whether an automobile insurance policy issued to a PSC as sole named insured of listed covered vehicles owned by the PSC provides first class coverage to the PSC owner injured while riding a bicycle.

West, Administrator v. Woodmen of the World Life Insurance Society, 2018-SC-138-DG

Arbitration. Insurance. Fraternal Benefit Societies. Issues involve whether the anti-arbitration provision in KRS 417.050 regarding “insurance contracts” includes life insurance contracts issued by fraternal benefit societies generally exempted from “insurance laws” under KRS 304.29-231.

Maggard v. Kinney, 2018-SC-153-DG

Torts. Immunity. Judicial Statements Privilege. Medical Licensure. Issues include whether the judicial statements privilege immunizes a complainant for allegedly defamatory statements made to the Kentucky Board of Medical Licensure in a written grievance or during grievance-related proceedings.

Gonzalez, Administrator v. Johnson, 2018-SC-224-DG

Torts. Fatal Police Chase Liability. Issues involve reconsideration of the viability of “per se no proximate cause” precedent dating back to Chambers v. Ideal Pure Milk Co., 245 S.W.2d 589 (Ky. 1952).

Marshall v. Montaplast of North America, Inc., 2018-SC-260-DG

Wrongful Termination. Public Policy. Issues involve the propriety of terminating a factory worker’s employment for telling three co-workers that a supervisor is a registered sex offender.

Benningfield v. Fields, 2018-SC-292-DG

KRS 342.197. Wrongful Discharge. Governmental Immunity. The issue in this matter is whether a governmental entity or its employees are immune from liability for a claim filed pursuant to KRS 342.197, for wrongful discharge for filing of a worker’s compensation claim. And if a governmental entity and its employees are subject to such a claim, were there genuine issues of fact in this case sufficient to overcome a motion for summary judgment.

DISCRETIONARY REVIEW GRANTED WITHOUT ORAL ARGUMENT
9/19/2018

VerraLab v. Cemerlic, 2017-SC-675-DG

Civil Procedure. Long-Arm Statute. Default Judgment. Issues include whether the defendants, an out-of-state doctor and his clinic, demonstrated good cause for setting aside a default judgment when they rejected certified mail from the Kentucky Secretary of State, their agent for service of process, and claimed to have no knowledge of the lawsuit.

Warick v. Commonwealth, 2018-SC-229-DG

Evidence. Suppression. Standing. Extension of DUI Stop. The issue is whether a driver lacked standing to seek suppression of evidence found by a search dog in a grassy area near the vehicle, after purpose for stop for a possible DUI had been accomplished. Another issue is whether a search of a passenger which disclosed drugs and paraphernalia would justify an extension of the DUI stop to bring a dog to the scene for a further search.

Floyd v. Neal, 2018-SC-277-DG

Jury Selection. Preservation of Error. Peremptory Challenge. The primary issue in this case is whether the trial court abused its discretion in not striking a juror for cause, when counsel's *voir dire* did not establish with certainty that this juror could render a fair and impartial verdict.

Jackson v. Estate of Day, 2018-SC-297-DG

Personal Injury. Limitation of Actions. Revival of Claims. The issue is whether a summary judgment dismissing a claim originally filed against a deceased tortfeasor which was amended to substitute the tortfeasor's estate after the limitations period had run, was appropriate. A secondary issue is what steps must a party plaintiff take to assure that the appropriate party defendant is named within the limitations period.

Morton v. Tipton, 2018-SC-390-DGE

KRS 405.021(1)(c). Grandparent Visitation. Preponderance of the Evidence. Best Interests of the Child. The issue in this case is whether in the case where the biological parents are not custodians, but grandparents are custodians, is preponderance of the evidence the proper standard for determining whether other grandparents should have visitation rights.

DISCRETIONARY REVIEW GRANTED 10/25/2018

Merritt v. Catholic Health Initiatives, 2018-SC-155-DG

Insurance. Captive Insurer. Unfair Claims Settlement Practices Act. Issues include whether a healthcare company's captive insurer is exempt from the Unfair Claims Settlement Practices Act.

Maguire v. Crook, 2018-SC-290-DG

Emotional Distress Damages. Issues involve whether expert medical testimony is required to present a jury question of entitlement to emotional distress damages for a "stand-alone" claim of statutory violation addressed in KRS 411.120, specifically alleging victimization of identity theft proscribed by KRS 514.160.

Knox Hills, LLC v. Ambac Assurance Corporation, 2018-SC-370-DG

Dispute Resolution. Arbitration. Condition Precedent. Substantive Procedural Arbitrability. Specific Performance. The primary issue was whether there was a precondition to arbitration in this case and whether that precondition could be and/or was waived by the lender. Also, an additional issue was whether the trial court correctly affirmed the award of the arbitrator.

DISCRETIONARY REVIEW GRANTED WITHOUT ORAL ARGUMENT
10/25/2018

Ashland Hospital Corporation v. Lewis, 2018-SC-276-DG and Lewis v. Shackelford, 2018-SC-279-DG

Medical Negligence. Expert Testimony. Summary Judgment. The issue here is whether the Court of Appeals erred in its holding that expert testimony was not necessary to establish that the lack of additional treatment lead to additional injury and damages due to a failure to timely diagnose and treat a stroke. Should this Court decide that expert testimony was necessary on the issue of causation and damages, an additional issue is whether the expert testimony proffered by the plaintiff was sufficient to overcome the defendants' motion for summary judgment.

DISCRETIONARY REVIEW GRANTED 8/8/18 and CROSS MOTION
GRANTED 12/5/18

CSX Transportation, Inc. v. Boggs, 2018-SC-191-DG and (Cross Motion) Boggs v. CSX Transportation, Inc., 2018-SC-440-DG.

FELA. Jury Instructions. Directed Verdict. Statute of Limitations. On the original motion for discretionary review, the issue was what is the proper instruction by which a jury should determine when the claimant in an FELA case knew or should have known that their injury was caused by their work. A second issue is whether an FELA claimant may recover for a worsening condition if a claim for the original injury is barred by the three-year statute of limitations. On this cross-motion for discretionary review, the issue is whether the claimant should have been entitled to a directed verdict at the close of the evidence regarding when he knew that his work activities had caused his physical complaints. A second issue was whether the trial court should have granted the claimant's motion *in limine* regarding the railroad's opposing argument in the damage phase of the trial, namely, that the railroad had not caused the claimant's injuries.

DISCRETIONARY REVIEW GRANTED 12/5/18

Waugh v. Parker, 2018-SC-405-DG

Uniform Residential Landlord Tenant Act. Building/Housing Codes. Remedies. The issue in this case is whether under the URLTA landlords owe a statutory duty to tenants to deliver premises in compliance with building/housing codes which materially affect safety. And if not, is the tenant injured by such a failure entitled to recover damages beyond the cost of repairing the premises.

DISCRETIONARY REVIEW GRANTED WITHOUT ORAL ARGUMENT 12/5/18

Murphy v. Commonwealth, 2018-SC-281-DG

Criminal Law. Guilty Plea. *Boykin* Colloquy. RCr 11.42. Issues include whether an intellectually disabled defendant's sentence should be set aside where counsel and the circuit court allegedly failed to ensure that he understood the act to which he was pleading guilty and the constitutional rights he was waiving.

Martin v. Commonwealth, 2018-SC-317-DG

Criminal Law. Statutory Interpretation. Shock Probation. KRS 439.265. Issues include whether a defendant's motion for shock probation is timely filed when it is made more than 180 days after his incarceration in county

jail upon sentencing, but less than 180 days after his transfer from county jail to state prison.

